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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1029

KENNECOTT COPPER CORPORATION,

*Petitioner,*

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## MEMORANDUM OF THE STATE OF NEVADA IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI

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February 1976

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The State of Nevada, a respondent herein, by virtue of Rule 21(4) of this Court's Rules, submits this memorandum in support of the petition of Kennecott Copper Corporation for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## STATEMENT

Pursuant to the Clean Air Act, as amended, the State of Nevada adopted an implementation plan for the control of sulfur dioxide emissions from Kennecott Copper Corporation's smelter at McGill, Nevada. The State's plan required that the smelter be fitted with controls that would capture 60% of the sulfur contained in the ore that is fed into the smelter. The supplementary control system, which was part of the control strategy for the facility, would guard against short-term violations of the Nevada ambient air quality standards (which in some cases are more stringent than the national ambient air quality standards) during periods of meteorological conditions adverse to the normal atmospheric dispersion of sulfur dioxide. These provisions assure that the national ambient air quality standards for sulfur dioxide would be attained and maintained at all times.

Nevertheless, the Administrator of the Environmental Protection Agency (hereinafter E.P.A.) in spite of the restrictions placed on the powers granted to him by the Clean Air Act, as amended, disapproved the State's plan and promulgated his own. The only material difference between the Federal plan and the Nevada plan was that the former required that the Petitioner, Kennecott Copper Corporation, conduct a research program for the purpose of developing and installing additional sulfur-capture equipment. The State of Nevada had elected not to include such a requirement in its plan because it was deemed unnecessary to assure compliance with either the national ambient air quality standards or the State standards.

Consequently, when Kennecott sought judicial review of the Administrator's disapproval of the State plan and promulgation of the Federal substitute, the State of Nevada intervened and appeared in support of Kennecott's position. The State contended



that the adoption of the Federal plan violated restrictions on the Administrator's powers specified in the Clean Air Act and infringed upon the State's prerogatives under the Act, and such action could have extremely serious economic consequences for the people of the State. However, the Court of Appeals for the Ninth Circuit affirmed the Administrator's action. Kennecott thereupon filed its petition for a writ of certiorari, seeking review of the lower court's decision by this Court and the State of Nevada hereby supports that petition.

## ARGUMENT

It is clear from the statutory language, the legislative history and this Court's previous interpretation of the Clean Air Act, that the states have been assigned the responsibility of determining what means of achieving national (and local where more stringent) ambient air quality standards are best suited to their particular local situation. However, with the support of the decision below, the Administrator of the E.P.A. has now imposed on the states a uniform Federal policy for the control of sulfur dioxide—a policy that applies regardless of whether it is needed for compliance with national standards—a policy that ignores the vast differences in the conditions among the states—a policy whose sole justification is the convenience and ease of enforcement by the E.P.A., definitely not the needs of meeting the ambient air quality standards. Since there is no way in which this action of the Administrator can be reconciled with the terms and intent of the law, a review of the lower court's decision is urgently called for.

The structure of the Clean Air Act recognizes that the interstate nature of free-flowing air warrants the imposition of national ambient air quality standards. However, the widely varying circumstances throughout the Nation require the preservation of state

authority over the means of attaining those standards. This very concept is clearly expressed in Section 107(a) of the Act, 42 U.S.C. 1857c-2(a):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 110(a) of the Act, 42 U.S.C. 1857c-5(a) further states that the Administrator *must* approve the state's plan as long as it provides for the attainment of the national standards and meets certain other specified conditions.

The Congressional purpose of allowing the states the freedom to select the means of attaining the national standards was amply confirmed in the legislative debates. Senator Muskie, the leading proponent of the legislation, had this to say (116 Cong. Rec. 42386 [1970]):

> May I say to the Senator that during the deliberations on the bill I have been very much interested in preserving "local option" features, so that State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs.

Similarly, after remarking that "the States must set up a plan which must meet the Federal standards," Congressman Staggers, the House manager, observed, (116 Cong. Rec. 19205 [1970]):

> In establishing the emission standards I am sure the States will take into consideration the particular problems of air quality control which exist in particular areas. This question will be left up primarily to the States.



See also, *e.g.*, 116 Cong. Rec. 32902–03, 33114–15, 42520 (1970).

In the leading case interpreting the pertinent provisions of the Clean Air Act, as amended, this Court repeatedly emphasized the freedom which Congress intended the state should have in selecting the appropriate measures for meeting the national standards, *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). The Court stated (421 U.S. at 79) that:

> so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

The Court further asserted that "Congress * * * left to the State considerable latitude in determining specifically how the standards would be met." (421 U.S. at 86–87). Again at page 79, this Court declared that: "[t]he Act gives the Agency no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satifies the standards of § 110(a)(2) and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)." (421 U.S. at 79.)

In spite of these clear evidences of the legislative will to the contrary, the E.P.A. has effectively preempted the State's authority to determine the method of controlling sulfur dioxide emissions. It has done so by imposing on the states a uniform Federal policy of achieving a maximum reduction of such emissions nationwide, irrespective of whether such a policy is necessary for the attainment or maintenance of national ambient air quality standards in any particular state. It has applied this policy in Nevada by

requiring that, as the price for its reliance on the State of Nevada's control strategy, Kennecott Copper Corporation must undertake a program for developing and installing further measures for the reduction of sulfur emissions. The E.P.A. has done so without regard to the fact that such a condition is neither required for the achievement of air quality standards in Nevada nor permitted by the authority granted to the Administrator in the Clean Air Act.

The Administrator has shown that he considers his "maximum emission reduction" policy to have nationwide applicability. He has already imposed it on a number of other states, see, *e.g.*, 39 Fed. Reg. 29357, 29358 (1974) (Kentucky); 40 Fed. Reg. 43231, 43232 (1975) (Utah); 40 Fed. Reg. 53584, 53586–87 (1975) (Idaho). In addition, on January 6, 1976, the Administrator issued a "Legal Interpretation and Guideline . . ." setting forth the manner in which the E.P.A. intends to implement this policy wherever the agency deems its application is warranted, see 41 Fed. Reg. 7450 (February 18, 1976). In this Guideline, the E.P.A. specifically identifies its Nevada regulation as an example of the type of condition the agency will impose in the future (*id.* at 7452 n.2).

The decision below, in approving the imposition of the E.P.A.'s "maximum emision reduction" policy on the State of Nevada, is completely contrary to the Clean Air Act's careful separation of functions and powers between the State and Federal governments. It deprives the states of their discretion to determine which control strategies are most responsive to their local problems and their local needs. It reposes in the E.P.A. the power to overrule a state's choice of emission limitations, even where the state's plan assures compliance with all national standards and all statutory conditions. It thus legislates a reallocation of pollution-control responsibilities that is contrary to the mandate of Congress contained in the Clean Air Act, as amended.



By the same token, the decision below is in conflict with this Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). The Court's opinion in that case was a clear affirmation of the State's primary role in selecting the means by which national air quality standards shall be met. It is vital to the sound administration of the Act—both in Nevada and elsewhere—that the conflict between the lower court's decision and this Court's decision in *Train* be resolved as soon as possible. For that reason, and for all of the reasons set forth in the petition for a writ of certiorari, review of the lower court's decision by this Court is plainly warranted.

## CONCLUSION

The State of Nevada supports the petition for a writ of certiorari filed herein and urges this Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ROBERT LIST
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*The State of Nevada*

February 1976